

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES NOVEMBER, 2010

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Brown
Milwaukee
Richland
Jefferson

TUESDAY, NOVEMBER 2, 2010

9:45 a.m.	09AP567-CR	State v. Miguel E. Marinez, Jr.
10:45 a.m.	09AP246	Deanne Phillips v. U.S. Bank National Association

WEDNESDAY, NOVEMBER 3, 2010

9:45 a.m.	9AP118-CR	State v. Alan Keith Burns
10:45 a.m.	8AP3235	Curt Andersen, et al. v. Department of Natural Resources
1:30 p.m.	06AP2851-D	Office of Lawyer Regulation v. Joseph L. Sommers

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

**WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 2, 2010
9:45 a.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Jefferson County Circuit Court decision, Judge Randy R. Koschnick, presiding.

2009AP567

[State v. Miguel E. Martinez, Jr.](#)

A decision in this child sexual assault case could clarify the law regarding the use of “other acts evidence” that arises when a child mentions the other acts during a videotaped statement.

Some background: Miguel E. Martinez was charged with sexually assaulting a four-year-old girl, prior to being arrested for burning the child’s hands with hot water in a separate incident.

The state sought to introduce the girl’s statements about the hand-burning incident in the videotaped interview for the jury in the sexual assault case. The state said the jury needed to hear the entire interview to establish facts about the case. The defendant objected, contending the facts could be established without reference to the incident in which her hands were burned.

The circuit court admitted the videotaped statement without excerpting references to the hand burning incident, and it concluded that evidence of the burn was offered for a proper purpose under Wis. Stat. § 904.04 (2). The circuit court determined that references to the burn in the video were needed to establish when and where the assault occurred and for establishing the defendant’s identity and context of the alleged sexual assault.

The jury found the defendant guilty of first-degree sexual assault of a child. He was sentenced to six years initial confinement and seven years extended supervision.

Martinez appealed. The Court of Appeals reversed, concluding that the state failed to meet its burden of proving the error was harmless. The Court of Appeals noted that the state referred to the hand-burning incident twice in its opening argument, and that the videotaped statement was played for the jury in its entirety.

The state argues although there was case law on the admission of other acts evidence in cases involving child victims, none of those earlier cases involve other acts evidence brought up by a child when discussing a charged offense in a videotaped statement or any type of admissible statement. The state contends the Court of Appeals overlooked the unique challenges presented by child victims.

**WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 2, 2010
10:45 a.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Timothy G. Dugan, presiding.

2009AP246

[Deanne Phillips v. U.S. Bank N.A.](#)

This case examines the nature of bonus and incentive pay under an at-will employment relationship. The Supreme Court is asked to review whether an employee who claims to have been denied earned bonus pay when fired has a cause of action for breach of implied duty of good faith and fair dealing.

Some background: Deanne Phillips worked in financial-planning positions for U.S. Bank from January 1998 until October 2007, when she was fired. The employment relationship was “at-will.” Nonetheless, the Bank’s alleged reasons for terminating Phillips’ employment became an issue during these proceedings because, Phillips alleged, that the Bank fired her to avoid paying her compensation she was owed under a benefits plan.

U.S. Bank asserts it fired Phillips on Oct. 26, 2007 because she knew about the plans of a co-worker to go with a competitor but lied to her boss when asked about it. Phillips contends her boss did not ask about plans of her co-worker.

Phillips’ annual salary was \$82,002. Her complaint alleges her employment contract with the Bank provided she would be paid her salary, plus bonuses and incentive pay. The complaint asserts that the agreement provided Phillips would be paid 15 percent of the first year earnings on all accounts she would sell, divided into four quarterly payments.

Phillips asserts \$18,373 of her 2007 sales bonus was due and payable as of October 2007, with the remaining \$28,350 due and payable during the first three quarters in 2008. She states that the Bank deposited to her account and then withdrew the \$18,373 October installment of the 2007 sales bonus.

The bank moved, and the circuit court entered a summary judgment of dismissal. Phillips appealed.

The Court of Appeals ruled: (1) an at-will employee does not forfeit benefits that have accrued during employment, even though the plan governing those benefits conditions their receipt on the employee’s continued employment, if the employer fires the employee solely to prevent her from obtaining the accrued benefits; and (2) genuine issues of material fact exist as to whether the reasons U.S. Bank gave for firing Phillips were pre-textual.

The bank stated that under the benefits plan, payments to employees were completely discretionary, and the plan requires Phillips to be employed at the time of payment. Because Phillips was an “at-will” employee, whose employment ended before actual payment, the Bank asserted she was ineligible for payment under the terms of the plan.

**WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 3, 2010
9:45 a.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Richland County Circuit Court decision, Judge Edward E. Leineweber, presiding.

2009AP118

[State v. Burns](#)

In this child sexual assault case, the defendant asks the Supreme Court to review whether a new trial must be held in the interest of justice on the ground that the case was not fully tried. The defendant contends that because the circuit court prevented certain evidence from being introduced, the state was able to argue, without contradiction, that there was no other explanation for the victim's post-assault behavior other than the defendant's guilt, even though the state was also simultaneously pursuing sexual assault charges against another individual for assaulting the same victim.

Some background, according to the Court of Appeals: Alan Burns was charged with 12 counts of second-degree sexual assault of a 14 year-old relative in 2004. Eleven of the counts were by reason of sexual contact, and one by reason of sexual intercourse.

After reporting these assaults by Burns, the alleged victim disclosed that she had been repeatedly sexually assaulted by another male relative since she was four years old, most recently in 2004. Before Burns' trial, the other relative was charged with three counts of repeated sexual assault of a child. Those charges remained pending at the time of Burns' trial. The other relative was later convicted of two counts.

At some point during the investigation, the girl told the police (1) that she had said to a friend that she had been a virgin prior to Burns' assault and that she didn't think she was a virgin any longer, (2) that she was worried about being pregnant, and (3) that the other relative had never molested her.

Burns filed a motion in limine asking for the ability to cross-examine the girl regarding these statements and her claims against the other relative. The state asserted that cross-examination on these points would run afoul of Wisconsin's rape shield law, Wis. Stat. § 972.11(2). Burns acknowledged that his requested cross-examination did not come within a statutory exception in the rape shield law, but he argued that he was nonetheless entitled to question the girl on these topics because of his constitutional right to present a defense.

The circuit court denied Burn's motion and prohibited him from questioning the girl regarding her abuse allegations against the other relative. With the jury unaware of those allegations, Burns called the other relative to the stand, where he testified that the girl was untruthful. In addition, during closing argument, the prosecutor argued that there was nothing else going on in the girl's life that would have caused her abnormal behavior. The jury ultimately found Burns guilty on all counts presented to it.

Burns filed a post-conviction motion for a new trial. The circuit court dismissed the count alleging sexual intercourse due to insufficient evidence, but denied the remainder of the motion relating to the counts alleging sexual contact. The circuit court concluded that the real controversy on those counts was the girl's credibility, which had been fully tried.

Burns appealed the judgment convicting him of ten counts of second degree sexual assault of a child under 16 years of age, in violation of Wis. Stat. § 948.02 (2007-08), and the

order denying his post-conviction motion for a new trial. Among other things, he argued that the prosecutor's closing argument had improperly asked the jury to infer a fact (there was no other reason for the girl's abnormal behavior) that the prosecutor knew to be false because of the pending allegations against the other relative. See State v. Weiss, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372. The Court of Appeals concluded that the prosecutor's argument, even if improper, did not mean that the real controversy in Burns' case had not been tried, and affirmed the convictions for unlawful sexual contact.

The Supreme Court may determine, among other things, whether the prosecutor's argument was proper, and if so, whether it prevented the real controversy from being fully tried, especially in light of the circuit court's order preventing Burns from questioning the girl about her allegations of abuse against the other relative.

**WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 3, 2010
10:45 a.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Brown County Circuit Court decision, Judge Timothy Hinkfus, presiding.

2008AP3235

[Curt Andersen, et al v. DNR](#)

In this case, the Supreme Court examines issues arising from a dispute between environmental advocates and the state Department of Natural Resources (DNR) over re-issuing a wastewater discharge permit for a paper manufacturing plant in Green Bay. A decision by the Supreme Court could have broad statewide implications for industries regulated by the permits.

Some background: On May 27, 2005, the DNR issued a public notice of its intent to re-issue a Wisconsin Pollutant Discharge Elimination System (WPDES) permit to Fort James Operating Co., which was subsequently acquired by Georgia-Pacific Consumer Products.

The DNR instructed interested citizens to submit written comments or request a public hearing on the proposed permit within 30 days.

A copy of the proposed permit accompanied the public notice. In lieu of limiting mercury discharges, the proposed permit required mercury sampling under an alternative limitation plan authorized by Wis. Admin. Code § NR 106.145 (May 2005). The proposed permit also included a phosphorus effluent limitation that was to be determined as a rolling 12-month average.

The Cleanwater Action Council of Northeastern Wisconsin (the Council) objected to the proposed phosphorus limitations, claiming the DNR failed to conduct a “reasonable potential analysis” required by federal law to determine the impact of additional phosphorus discharges on water quality. The comment also alleged state rules permitting phosphorus effluent limitations as a rolling 12-month average violated federal law, and that the DNR violated state law by failing to perform an anti-degradation analysis. The Council did not contest the permit terms governing mercury sampling.

On Aug. 24, 2005, the DNR determined none of the Council’s objections merited further action and decided to re-issue the permit. The Council was ultimately denied a public hearing on many of its challenges to permitted phosphorus discharges because the DNR summarily concluded it lacked authority to resolve any challenge based on federal law.

On April 13, 2006, the Council petitioned for judicial review. It also requested a judgment declaring that the availability of a § 383.63, Stats., public hearing is not conditioned on having raised issues during the public comment period.

The Council claimed the DNR and Brown County Circuit Court (1) incorrectly interpreted Wis. Stat. § 283.63 to require that contested issues be raised during the public comment period to preserve them for consideration during later proceedings; and (2) improperly concluded the DNR lacks authority to determine whether the permit violates federal law.

The Council also sought judgment declaring that the DNR was required to comply with federal regulations and invalidating several state administrative code provisions relating to phosphorus and mercury discharges as conflicting with federal law.

The circuit court dismissed the Council's petition and affirmed the DNR's decision. The Council appealed, and the Court of Appeals reversed and remanded for a public hearing to be conducted in accordance with the procedures set forth in § 283.63. The Court of Appeals concluded, among other things, that the DNR possesses authority to determine whether provisions within a state-issued wastewater discharge permit comply with federal law.

The DNR now asks the Supreme Court to review whether an administrative permit review hearing is the appropriate forum for dispute over the application of federal law.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 3, 2010
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates, and, if warranted, prosecutes the attorney. A referee – a Supreme Court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Dane County.

2006AP2851-D Office of Lawyer Regulation (OLR) v. Joseph L. Sommers

This lengthy and involved lawyer discipline case originally stems from an attorney's defense of a 17-year-old accused, and later acquitted of, negligent homicide by operation of a motor vehicle. Atty. Joseph L. Sommers represented the defendant, and Dane County Assistant District Atty. Paul M. Humphrey initially prosecuted the case. Disciplinary charges were later filed against both attorneys for their respective conduct during the underlying case. The case against Humphrey remains pending.

The Supreme Court previously heard arguments on the issue of whether certain files of the OLR are confidential. Sommers asked to review the OLR's investigative files to help with his defense in this discipline case and to ensure information he submitted was properly presented and considered.

Some background: Adam Raisbeck was the driver in a one-car rollover accident that killed one passenger and injured the other passenger. Raisbeck was accused of causing the accident by traveling at an excessive rate of speed. Raisbeck was acquitted of homicide by negligent operation of a motor vehicle, following a four-day jury trial in April 2005.

Sommers is accused of yelling at a judge so loudly during a hearing in the Raisbeck case on May 24, 2004 that he interrupted proceedings and courthouse operations. Sheriff's deputies and bailiffs rushed to the courtroom in response to the commotion. Sommers is also accused of disseminating information to the public through interviews with the media and on Web sites while the Raisbeck matter was still being litigated.

On Nov. 17, 2006, the OLR filed a disciplinary complaint against Sommers, alleging three counts of misconduct and recommending a 60-day suspension of Sommer's law license. One of the counts stemmed from Sommers' courtroom outburst. Another count accused him of extrajudicial statements he knew or should have known would have a substantial likelihood of materially prejudicing an adjudicative proceeding. Another count alleged Sommers committed misconduct by asserting in court documents that there was no evidence that a subpoena had been served on a potential witness.

Sommers has contended throughout the Raisbeck matter and this disciplinary proceeding that the district attorney's office has engaged in prosecutorial misconduct, which has been systematically ignored by the individuals in the district attorney's office, the trial courts, OLR and the Supreme Court.

A referee assigned to the case as part of the lawyer discipline case process found Sommers committed two counts of misconduct and recommended a 30-day suspension. Sommers appealed.

Sommers also contends much of his lawyer discipline case has been mishandled at various steps along the way, from the filing of the complaint and related materials, to discovery, the evidentiary hearing and a series of motions and proposed counter claims. As part of an affirmative defense, he accuses members of law enforcement and court staff, including judges and justices, and OLR staff of engaging in misconduct or unethical behavior.

The Supreme Court is expected to decide if Sommers engaged in misconduct, and if so, what the penalty shall be.